

## CASE LAW NOTE JANUARY - JUNE 2017

### Highlights of treaty body jurisprudence in individual complaints

#### CEDAW, 66th session, 13 February - 3 March 2017

At its session, the Committee adopted 1 Views finding a violation (concerning Moldova) and 2 decisions declaring a communication inadmissible (concerning Denmark and the Russian Federation). The Committee also decided to discontinue the consideration of 2 pending communications.

- **Communication No. 58/2013 - L.R. v Moldova - Lack of effective protection against domestic violence**

The case concerned domestic violence by a husband against his wife L.R. that lasted even after their divorce. L.R. had made numerous complaints to the police and to prosecutorial authorities and requested to initiate criminal proceedings against her husband, which were not acted upon. The divorce judgment did not provide for the sale of the marital home and as a consequence even after the divorce, they continued living in the same house, the complaints of domestic violence notwithstanding. The Committee noted the biased reasoning of the judges for the denial of L.R.'s applications for protection orders and expressed concern at the disturbing practice of subjecting victims of domestic violence to psychiatric examination for a "proper assessment of the crime reported" and, as in the present case, ordering a mandatory 10-day stay in a psychiatric hospital for the purpose of establishing L.R.'s mental anguish. The Committee concluded that the decisions made by the courts and the police had been based on stereotyped, preconceived and therefore discriminatory notions of what constitutes domestic violence, in violation of articles 1, 2 (a), (c), (d) and (e), 5 (a) and 16 of the Convention.

For the full text of all decisions adopted by the Committee at its session, please consult the treaty body case law database:  
<http://juris.ohchr.org/>

or the Committee's session page:

[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CEDAW](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CEDAW)

## **Human Rights Committee, 119<sup>th</sup> session, 6 - 29 March 2017**

At its session, the Committee adopted 19 Views finding a violation of the Covenant (concerning Algeria, Australia, Belarus, Bosnia & Herzegovina, Canada, Denmark, Ireland, Kazakhstan, Kyrgyzstan, Nepal, Russian Federation, Uzbekistan and Venezuela), 4 Views finding no violation of the Covenant (concerning Denmark), and 11 decisions declaring communications inadmissible (concerning Austria, Belgium, Colombia, Denmark, Kazakhstan and New Zealand). It also decided to discontinue the consideration of 9 pending communications.

### **- Communication No. 2172/2012, G v Australia - Refusal to have the sex changed on the birth certificate of a married transgender person constituted arbitrary interference with privacy and family as well as discrimination**

G is male-to-female transgender, who is married to a female partner. Whereas her sex change was registered in her driver's licence, medicare card and passport, her requests to have the birth certificate changed was refused by the New South Wales Registry since according to the law a person must be unmarried at the time of application to register a change of sex. G claimed that this refusal constituted arbitrary or unlawful interference with her privacy and family within the meaning of article 17 of the Covenant as well as discrimination under article 26 of the Covenant. The Committee noted that the State party had not provided any explanation why a change in sex on a birth certificate would result in irreconcilable and unacceptable conflict with the Marriage Act 1961 if the author remains married, whereas a change in sex on her passport in identical circumstances is allowed. Nor had the State party explained why it is in the State party's interest to issue documents with conflicting identity markers, or documents containing identity information that is not consistent with the actual personal situation, since such documents would mislead a government office, passport control etc. as to the true identity of the bearer. Second, the State party's legal regime leaves to individual state and territorial Governments the decision whether to refuse or allow changes to a married transgender person's sex on a birth certificate. The State party had not explained why denying altered birth certificates to married transgender persons is necessary to ensure consistency with the Marriage Act 1961, when federal law allows state and territorial Governments to issue precisely such birth certificates. In the absence of convincing explanations from the State party, the Committee was of the view that the interference with the author's privacy and family was not necessary and proportionate to a legitimate interest, and was therefore arbitrary and a violation of article 17 of the Covenant. The Committee similarly considered that by denying married transgender persons a birth certificate that correctly identifies their sex, in contrast to unmarried transgender and non-transgender persons, the State party failed to

afford G. equal protection under the law as a married transgender person.

- **Communication No. 2216/2012, C v Australia - Denial of access to divorce proceedings of same sex couple married abroad**

The case concerned a woman, C, who resides in Australia and had married in Canada her same sex partner. When her relationship broke up, she was not able to request a divorce in Australia, since Australian law did not provide for same sex marriages and as a consequence, not for divorce either. Australia submitted that its divorce law framework was aimed at ensuring that those whose foreign marriages are recognized as valid in Australia have the ability to divorce in Australia and that this aim is legitimate; the proscription of divorce for foreign marriages not recognized in Australia is laid down in legislation and is therefore objective; and the exceptions to this rule are based on objective and reasonable criteria: the purpose of the exception for foreign polygamous marriages is to enable parties to foreign polygamous marriages access to the assistance, relief and help provided by the family law courts in relation to (but not limited to) children's matters, property matters, maintenance matters or divorce. As to foreign marriages of persons between 16 and 18 years, once the parties attain the age of 16, the marriage could be considered valid under Australian law. The Committee considered that the State party's explanation as to the reasonableness, objectivity and legitimacy of the distinction for the differential treatment between the two above mentioned categories of foreign marriages not recognized in Australia and foreign same-sex marriages was not persuasive, and that compliance with domestic law does not in and of itself establish the reasonableness, objectiveness, or legitimacy of a distinction. In particular, the Committee noted that the State party failed to provide a reasonable justification for why the reasons provided for recognizing the exceptions do not also apply to C's foreign same-sex marriage. For example, the State party has failed to provide any explanation why its stated reason for providing divorce proceedings for unrecognized foreign polygamous marriages, does not apply equally to unrecognized foreign same sex marriages. In the absence of more convincing explanations from the State party, the Committee considered that the differentiation of treatment based on her sexual orientation to which C was subjected regarding access to divorce proceedings is not based on reasonable and objective criteria and therefore constitutes discrimination under article 26 of the Covenant.

For more information and other decisions adopted by the Committee at its session, please consult the treaty body case law database: <http://juris.ohchr.org/> or the Committee's session webpage:

[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CCPR](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CCPR)

## **CRPD, 17<sup>th</sup> session, 20 March - 13 April 2017**

At its session, the Committee adopted 3 decisions declaring communications inadmissible (concerning Australia, Sweden and the United Kingdom). It also decided to discontinue the consideration of 1 pending communication (concerning Spain).

For the full text of the decisions, please consult the treaty body case law database: <http://juris.ohchr.org/>

Or the Committee's session page:

[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CRPD](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CRPD)

## **CAT, 60<sup>th</sup> session, 18 April - 12 May 2017**

At its session, the Committee adopted 8 merits decisions finding a violation of the Convention (concerning Australia, Burundi, Denmark, Georgia, Kazakhstan, and Switzerland), 8 merits decisions finding no violation of the Convention (concerning Australia, Canada, Denmark, Finland, Netherlands and Switzerland) and 1 decision declaring a complaint inadmissible (concerning Sweden). It also decided to discontinue the consideration of 6 pending communications.

### **- Communication No. 579/2013, G.N. v Burundi - Lack of effective investigation of rape of child by army officer**

The case was presented by the mother of a girl, who had been raped by a military official, captain D.K., in June 2012, when the girl was nine years old. The captain, a friend of the family, had been on a night patrol in the district where the girl lived and visited the girl's home. When leaving, he asked the mother whether the girl could accompany him, which she refused. Later, the mother realized that the girl was no longer at home. She eventually returned home the next day, and some days later explained to her mother that she had been raped by Captain D.K, who had threatened her with a firearm if she told what had happened. The perpetrator proposed an out-of-court settlement to the family, which the mother rejected. She reported the rape and a case number was assigned. Witnesses were summoned and an expert medical opinion was ordered, which found evidence of rape. However, a new judge was assigned to the case, and in February 2013, eight months after the rape, the case was dismissed, owing to the absence of elements of an offence.

The Committee noted the uncontested evidence that the girl was under the physical control of an officer of the Burundian national army at the time of the facts; and that the undeniable pain and suffering inflicted to the child were compounded by intimidation. The Committee concluded that the acts fell within the scope of article 1 of the Convention.

The Committee considered that given the premature termination of the investigation, there were substantial grounds for believing that the procedure was not impartial. The Committee further condemned the fact that after the dismissal of the case, no other suspect was arrested and brought before the courts of the State party, meaning that the perpetrator of the rape had gone unpunished, despite the fact that the Burundian Criminal Code (art. 558) provides that rape is punishable by life imprisonment when committed against a child under 12 years of age.

The Committee concluded that a violation of articles 12, 13 and 14 of the Convention has occurred, in conjunction with article 1, of the Convention.

For more information and the text of decisions adopted by the Committee at its session, please consult: <http://juris.ohchr.org/>  
Or the Committee's session page:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1011&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1011&Lang=en)

### **CESCR, 61<sup>st</sup> session, 29 May - 23 June 2017**

At its session, the Committee adopted 1 Views finding a violation of the Covenant (concerning Spain) and 1 decision declaring a communication inadmissible (concerning Portugal).

- **Communication No. 5/2015, Djazia & Bellili v. Spain: Eviction of a family without providing for alternative housing**

The case concerned a couple, Mr Djazia and Ms Bellili, who lived in a rented room in a flat in Madrid, together with their minor children, for several years. In 2012, the couple stopped receiving unemployment benefits and were unable to continue paying the rent. Subsequently, the lessor brought a civil proceeding against the authors for forced eviction on the ground that the contractually established term had elapsed. On 3 October 2013, a court in Madrid ordered their eviction, without providing for alternative housing.

The Committee concluded that although the couple's and their children's eviction was carried out in accordance with the law and was a legitimate measure, it violated their right under article 11 (1), read separately and in conjunction with articles 2 (1) and 10 (1), of the Covenant, since the State party failed to provide them with alternative housing. The Committee noted that on several occasions a Court had instructed that the Department of Social Affairs and the Government Agency for Family and Social Services of Madrid City Council should be requested to adopt measures to guarantee the right of the minor children to decent and adequate housing, without success.

The Committee further noted that the Court ordered the eviction of the family on 3 October 2013, despite the fact that they did not have alternative housing or sufficient income to obtain accommodation on the private market and that there was no record that the Social Services of Madrid responded in a timely manner to the Court's earlier requests. As a result, after staying in a short-stay shelter, the family slept in a car for four days. Against this background, the Committee considered that the family's eviction without assurances that alternative accommodation would be available constitutes a violation of their right to adequate housing, unless the State party could convincingly demonstrate that, despite having taken all reasonable measures to the maximum of its available resources, and having taken into consideration the family's personal circumstances, it was unable to uphold the right to housing. In this connection, the Committee considered that the State party had failed to demonstrate that it had made all possible efforts, using all available resources, to realize, as a matter of urgency, the right to housing of persons who, like the authors, were in a situation of dire need. The State party had not explained to the Committee why the regional authorities in Madrid, such as the Madrid Housing Institute, sold part of the public housing stock to investment companies, thereby reducing the availability of public housing, despite the fact that the number of public housing units available annually in Madrid was significantly fewer than the demand. Nor had it explained how this measure was duly justified and was the most suitable for ensuring the full realization of the rights recognized in the Covenant. The Committee noted that in certain circumstances States parties might take deliberately retrogressive measures. However, in such cases, the State party must demonstrate that the decision was based on the most thorough consideration possible and was justified in respect of all the rights under the Covenant and that all available resources were used. In times of severe economic and financial crisis, all budgetary changes or adjustments affecting policies must be temporary, necessary, proportional and non-discriminatory. The Committee concluded that in this case, the State party had not convincingly explained why it was necessary to adopt the retrogressive measure of selling public housing stock, which resulted in a reduction of the amount of social housing precisely at a time when demand for it was greater owing to the economic crisis.

See also the Committee's press release:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21842&LangID=E>

For more information and the text of decisions adopted by the Committee at its session, please consult the treaty body case law database: <http://juris.ohchr.org/> or the Committee's session page:

[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/  
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